Nos. 83-1660 and 83-6381

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES M. ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, PETITIONER

v.

GILL PARKER, ET AL.

GILL PARKER, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF IN NO. 83-1660 AND BRIEF IN NO. 83-6381 FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that individualized advance notice be given to each affected food stamp recipient prior to the implementation of statutory benefit level adjustments, when the statutory change can be implemented without any new or additional factual findings as to individual recipients.

2. Whether, assuming that the Due Process Clause requires some type of individualized advance notice, the notices issued by the Massachusetts Department of Public Welfare in the instant case, coupled with the other procedures for reducing the risk of error, were constitutionally sufficient.

3. Whether the notices in this case were adequate under the Food Stamp Act and the pertinent federal regulations.

4. Whether, assuming that the notices in this case were in violation of the Constitution or applicable statutory or regulatory provisions, the court of appeals correctly reversed the district court's remedial order, which would have required the retroactive payment of food stamp benefits to the plaintiff class in excess of the level authorized by Congress and would have required the Commonwealth to promulgate notice regulations under district court supervision.

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SUMMARY OF ARGUMENT

This case involves the implementation of a 1981 statutory reduction in food stamp benefits. Section 106 of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 360, reduced the amount of earned income deducted (or "disregarded") in the calculation of a household's food stamp benefits from 20%

to 18%. Plaintiff-respondents filed suit in federal court to challenge the means by which the Commonwealth of Massachusetts implemented this statutory change. The district court held that the notice provided by the Commonwealth was insufficient, and ordered the Commonwealth to restore the benefit reduction retroactively to all members of the plaintiff class. The court of appeals, while agreeing with the district court that the notices were insufficient, reversed the remedial order. Plaintiff-respondents petitioned for review of the reversal of the remedial order (No. 83-6381) and the Commonwealth cross-petitioned for review of the holding that its notices were insufficient (No. 83-1660). This Court granted both petitions.

In our opening brief, we demonstrated that the notices sent by the Commonwealth of Massachusetts did not violate the Due Process Clause. Since the reduction in food stamp benefits was a result of a statutory change rather than a factual determination by the state agency, it need not have been preceded by due process protections of notice and a hearing. And even if some notice was constitutionally required, the Commonwealth's notice explained, in terms "generally familiar" to food stamp recipients (as the district court found (Pet. App. A96)), the nature of the change in benefits and the availability of a fair hearing in the event of error. Additional procedures required by statute and regulation guarantee further information to recipients and reduce the risk of computational error. Due process requires no more. Since the lower courts' rulings on plaintiff-respondents' claims of statutory and regulatory deficiencies were wholly dependent on the prior constitutional holding, and no independent inconsistencies between the notices and the Food Stamp Act or the Department's regulatory notice requirements had been identified in the litigation, the notices were fully sufficient under law.

Plaintiff-respondents' brief takes issue with our submission on the sufficiency of the notice, and also intro-

duces the remedial issue. We shall therefore first reply to plaintiff-respondents' arguments on the sufficiency of notice, and then turn to the remedial question.

I. Plaintiff-respondents first urge this Court not to address the question of the sufficiency of notice, but to dismiss the Commonwealth's cross-petition as improvidently granted. Since this is but a reiteration of the arguments they presented unsuccessfully in opposition to the Commonwealth's petition, and is in any event of little merit, this suggestion should be rejected.

On the merits, plaintiff-respondents place primary emphasis on independent statutory grounds for affirmance, not articulated by the lower courts. They contend that the second clause of 7 U.S.C. 2020(e)(10), which requires states to maintain prior levels of benefits during the pendency of a fair hearing on an adverse action, indicates that Congress intended the states to provide advance notices to food stamp recipients, even in cases where benefits are reduced by Act of Congress, containing information about how the statutory change will affect each individual household. However desirable such recipient-specific notices may be as a matter of practice, however, neither the statute nor the Department's regulations require them.

The Department's regulations clearly distinguish between "adverse actions," which are fact-specific reductions or terminations applying to a particular food stamp recipient, and "mass changes," which are changes in the law that apply on an across-the-board basis to all or a large segment of the recipient population. Adverse actions must be accompanied by recipient-specific notices; mass changes need only be preceded by a general notice informing all affected recipients of the nature of the change. Section 2020(e)(10), far from invalidating this regulatory scheme, incorporates it. The section does not itself require any notice whatsoever. However, in addressing the effect of notices on the right to continued benefits during fair hearings, the section explicitly

adopts the terminology of the Department's notice regulations. The legislative history shows that Congress was aware of, and understood, the Department's distinction between adverse actions and mass changes. Thus, when Congress used the same terminology in the second clause of Section 2020(e)(10), it was evidently intending the same meaning to apply.

Plaintiff-respondents also defend the lower courts' finding of a due process violation. However, they wholly fail to explain how the advance notice and hearing procedures required when a welfare recipient claims that he will receive fewer benefits than he is entitled to under law (see *Goldberg* v. *Kelly*, 397 U.S. 254 (1970)) can be stretched to require advance notice and a hearing before a change in the law can be put into effect. And even assuming some notice is required, plaintiff-respondents substantially overestimate the risk of error in the Commonwealth's procedures and the value of more elaborate notices to food stamp recipients. The result is to create a highly disruptive constitutional rule with no perceptible limiting principle.

II. On the remedial question, plaintiff-respondents contend, in the alternative, that they were entitled under 7 U.S.C. 2023(b) to retroactive benefits at the prior statutory level, or that the district court's order granting them such benefits was within the court's equitable discretion. Neither theory has merit.

Section 2023(b) itself is a limitation on the courts' power to grant retroactive benefits—even to recipients who were entitled to them under law—for a period exceeding one year before discovery of the error. The section is parallel to 7 U.S.C. 2020(e)(11), which requires states to restore wrongfully denied benefits for a period of up to one year. Both provisions originated in a prior regulatory requirement for restoration of lost benefits. The language of the prior provisions and the legislative history accompanying the congressional amendments make clear that the only errors for which restoration is

available are *substantive* errors in food stamp allotments. There is no right to receive benefits at a level exceeding the statutory level because of procedural errors that did not result in an incorrect allotment.

It follows that the district court's order was not within the court's equitable discretion. A court has no discretion to disregard other law, or to set its own level of welfare benefits as a result of procedural errors. This Court has plainly rejected the notion that a plaintiff is entitled to retroactive benefits for a due process violation where he cannot show that there was a substantive error in his case. *Carey* v. *Piphus*, 435 U.S. 247 (1978); *Codd* v. *Velger*, 429 U.S. 624 (1977).

Moreover, it would be a violation of sovereign immunity to require the Commonwealth or the federal government to pay retroactive benefits at a level exceeding that established by law. The court of appeals was correct in reversing this order.

The remaining aspects of the district court's order, requiring the Commonwealth to develop new regulations under district court supervision, were also correctly reversed by the court of appeals. Such a remedy is a serious intrusion into the Commonwealth's authority, delegated to it by Congress. The district court made no findings that would justify such an extreme remedy. As the court of appeals observed, both the good faith of the Commonwealth and the lack of any indication that injunctive relief would be required to ensure lawful conduct in the future make the district court's injunctive order inappropriate.

ARGUMENT

I. THE MASSACHUSETTS NOTICE SATISFIED ALL APPLICABLE STATUTORY, REGULATORY, AND CONSTITUTIONAL REQUIREMENTS

A. This Court Is Not Precluded From Reaching The Issues Raised By The Commonwealth's Cross-Petition

On June 18, 1984, this Court granted the Commonwealth's cross-petition for a writ of certiorari in No. 83-1660, which raised two questions: the validity of the court of appeals' holding that the Commonwealth's notice to food stamp recipients violated the recipients' due process rights, and the correctness of the court of appeals' standard of review of the findings of the district court.

Plaintiff-respondents urge this Court (Br. 18-22) to dismiss the cross-petition in No. 83-1660 as improvidently granted, on the basis that the Commonwealth's notice was in violation of 7 U.S.C. 2020(e)(10) and that it is therefore unnecessary for this Court to review the lower courts' determination that the notice was in violation of the Due Process Clause. This merely reiterates the argument plaintiff-respondents unsuccessfully made in their brief in opposition to the cross-petition (at 1-3, 5). No intervening circumstances or additional information have come to light that would warrant a different disposition now. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 559 (1957) (Harlan, J., concurring and dissenting) (dismissal as improvidently granted not warranted "in the absence of considerations appearing which were not manifest or fully apprehended at the time certiorari was granted"); see also *Burrell* v. *McCray*, 426 U.S. 471, 474-475 (1976) (Brennan, J., dissenting); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959).

In any event, plaintiff-respondents' position is without merit. Although the Commonwealth did not explicitly address the statutory holding of the courts below in its questions presented, that question is fairly subsumed.

See Sup. Ct. R. 21.1(a). As noted in our opening brief (at 18 n.18), the court of appeals expressly predicated its statutory holding on its prior conclusion that the Commonwealth's notice violated the Due Process Clause. The court stated the basis for its statutory holding as follows (Pet. App. A31-A32) (emphasis added)): "We doubt that Congress intended a constitutionally deficient notice to satisfy the statutory notice requirement and *thus* we affirm the district court's conclusion that the December notice failed to satisfy the notice requirements of 7 U.S.C. 2020(e)(10) and 7 C.F.R. § 273.12(e)(2)(ii)."[1] This makes clear that the court's statutory holding follows from, and is dependent on, its prior constitutional holding. The court of appeals was surely aware of the fundamental principle that the courts should not adjudicate constitutional issues where there are alternative bases for decision. That the court found it necessary to address the constitutional question at great length corroborates this interpretation of the opinion.

Although we agree that plaintiff-respondents may raise independent statutory grounds for affirmance of the court's holding on the liability issue, such grounds cannot, under the circumstances, preclude the Commonwealth and the federal respondent from addressing the issue properly raised in the cross-petition, or from contesting plaintiff-respondents' independent statutory position.[2]

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[1] The additional discussion of Section 2020(e)(10) to which plaintiff-respondents refer (Br. 19) was necessary to establish that the statute applies at all to mass changes (a conclusion with which we disagree); having found that it applies, the court based its holding that the statute was violated solely on its conclusion that the statute would, at a minimum, have to incorporate what the court of appeals believed to be the constitutional standard.

[2] Moreover, the Commonwealth, in its petition, challenged the standard of review applied by the court of appeals to the district court's factual findings. This question perforce applies to both the constitutional and the statutory holdings below.

Finally, it would be difficult for this Court adequately to address plaintiff-respondents' own remedial question in the absence of a holding on the constitutional question. Plaintiff-respondents contend that they are entitled, as a remedy for the alleged deficiencies in the Commonwealth's notice, to receive food stamp benefits in excess of those established by statute. Whether such a remedy would be appropriate in the event of a *constitutional* violation (and we think it would not), it seems clear that the payment of such benefits would be wholly inappropriate as a remedy for violations of a mere regulation or a previously-enacted statute. Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979). The lower courts' remedial holdings were predicated expressly and exclusively on the finding of a constitutional violation (see Pet. App. A32, A38 (court of appeals); *id.* at A99-A104 (district court)). For this Court to address the remedial question raised in No. 83-6381 solely on the assumption of a *statutory* violation would place the remedial issue in an entirely different legal context from that in which it was decided below.

B. The Massachusetts Notice Conformed To All Regulatory And Statutory Requirements

While contending that the notice sent to Massachusetts food stamp recipients in December 1983 violated the notice provisions of the Food Stamp Act, 7 U.S.C. 2020 (e)(10) (Br. 22-30), plaintiff-respondents virtually ignore the regulations that govern the issuance of notices. These regulations make clear that the Commonwealth was not obligated to provide advance notice of how the statutory change in the earned income disregard would affect each recipient household, but was obligated solely to inform them of the nature of the change in general terms.

The Department's regulations implementing the statutory change in the earned income disregard instructed the states to provide notice to affected recipients in the

manner prescribed for mass changes. 46 Fed. Reg. 44722 (Sept. 4, 1981). Those regulations, in turn, provide (7 C.F.R. 273.12(e)(2)(ii)):

> A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change.

Notices of adverse action, described at page 4 of our opening brief, must contain specific information on the action to be taken with respect to each recipient household.[3] Such notices, however, are required only in the event of an "adverse action"—*i.e.*, a termination or reduction initiated by the state agency on the basis of the facts in a particular case (see 7 C.F.R. 273.13(a)(2) (1983))—a category of actions that expressly excludes "mass changes." 7 C.F.R. 273.13(b)(1). Mass changes, as the regulation quoted above indicates, need not provide recipient-specific information; the only requirement is that the states "shall send individual notices to households to inform them *of the change*."[4] As the court of

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[3] Even a notice of adverse action need not necessarily contain all of the information plaintiff-respondents seek. 7 C.F.R. 273.13(a)(2) (1983). The notice must contain a description of the "proposed action," but need not necessarily contain the former benefit level, the new benefit level, and other information "[s]ufficient * * * to allow the recipient to determine whether an error has been made." Cf. Pet. App. A103-A104. This Court need not decide what information is required under the adverse action regulations, since, as the court of appeals held (Pet. App. A28-A29), those regulations do not apply to a mass change, such as that involved in this case.

[4] Plaintiff-respondents contend (Br. 28) that the term "individual notice," which is found in both the mass change regulation and in 7 U.S.C. 2020(e)(10), necessarily "contains the requirement for recipient-specific information." Indeed, they suggest (Br. 29) that, to be "individual notice," the notice must "include at least the amount of the proposed reduction to each household and the earned income figure upon which that reduction was premised." This argu-

appeals held, the change in the earned income disregard, at issue here, was subject to the "mass change" requirements, not the "adverse action" requirements (Pet. App. A28-A29).

Plaintiff-respondents disregard the distinction made in the regulations, and acknowledged by the court of appeals, between mass changes and adverse actions. They contend that the Food Stamp Act itself, in Section 2020 (e)(10), imposes a requirement of advance notice, with recipient-specific information for all cases in which benefits are reduced or terminated for whatever reason. The necessary implication of their position is that the Department's regulations—which predate the 1977 Act and have never been questioned by Congress—are inconsistent with the Act.[5] We do not agree.

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ment has no merit. "Individual" notice simply means notice provided to each individual household; the term indicates that general notice to the public through the Federal Register or the mass media is not sufficient. See pages 13-14, *infra*, discussing the 1978 change in the mass change notice regulation, which makes this clear.

[5] An alternative explanation is that the mass change regulations impose the same recipient-specific notice requirements as are mandated for adverse actions. Presumably, this is what plaintiff-respondents mean when they state (Br. 28 n.16) that the Secretary "did seem to recognize that the notice [of mass changes] would require recipient-specific information." However, this would make nonsense of the explicit statements in 7 C.F.R. 273.12(e)(2)(ii) and 7 C.F.R. 273.13(b)(1) that the requirements for notice of adverse actions do *not* apply to mass changes. That the mass change regulation uses the term "individual notice" does not (as explained at note 4, *supra*) imply that the notice must include recipient-specific information. And the reference in the mass change regulation to the requirement of a fair hearing in cases where "the issue being appealed is that the food stamp eligibility or benefits were improperly computed" is no more than a recognition that, when such an error is discovered at any time, with or without notice, the recipient has a right to a fair hearing. Experience shows that notice of a mass change often induces recipients to investigate the correctness of their benefits, and sometimes to discover an underlying error. Indeed, this happened in the case of two of the four named plaintiffs in this action. See Fed. Resp. Br. 11-12 n.16.

Certainly, nothing in the language of the Food Stamp Act conflicts with the Department's regulations or imposes any notice requirements in excess of the regulatory requirements. The only statutory reference to notice is contained in the second clause of Section 2020(e)(10). This provision does not directly impose any notice requirements whatever; the statute merely *presupposes* the existence of notice (7 U.S.C. 2020(e)(10) (emphasis added)):

> [A]ny household which timely requests such a fair hearing *after receiving individual notice of agency action* reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately *prior to the notice of adverse action* until such time as the fair hearing is completed * * *.

By its terms, Section 2020(e)(10) thus relates to the *consequence* of notice; the *requirement* of notice is imposed by preexisting regulation. The meaning of the statutory references to "individual notice of agency action" and "notice of adverse action" is therefore to be found in the regulatory notice requirements as they existed in 1977, when this portion of the statute was enacted (Pub. L. No. 95-113, § 1301, 91 Stat. 972), and is illumined by the history of those regulatory provisions.

When a notice requirement was first imposed by the Department in 1971, no distinction was made between adverse actions and mass changes. See 7 C.F.R. 271.1(n) (1972). The same type of notice was required for each. In 1974, however, the Secretary amended the regulations to provide that "[i]ndividual notices of adverse action are not required when: (i) Mass changes in benefits are required for certain classes of recipients because of changes required by Federal or State law or Federal Regulation affecting the basis of issuance tables, income standards, or other eligibility criteria * * *" (7 C.F.R.

271.1(n)(2) (1975)). In the case of such mass changes, the states were required to "publicize the possibility of a change in benefits through the various news media or through a general notice mailed out with [food stamp allotment] cards and with notices placed in food stamp and welfare offices" (*id.* § 271.1(n)(3)). The explanation in the Federal Register stated that the change would "relieve State agencies of the obligation to identify and notify each household whose benefits are affected by the mass change and, at the same time, will provide households in a reasonable manner with an indication that some change in their program status should be expected." 39 Fed. Reg. 25996 (July 15, 1974).

This was the form of the notice regulations in 1977 when Congress incorporated the references to notice in the second clause of Section 2020(e)(10). When Congress used the term "notice of adverse action," it was referring directly to the individual "notice of adverse action" requirements in the Department's regulations. And when Congress used the term "individual notice of agency action," it could not have been referring to mass changes, since no *individual* notice of mass changes was required at that time. The legislative history confirms this. The House Report, H.R. Rep. 95-464, 95th Cong., 1st Sess. (1977), contained a summary of "[t]he current Federal rules" governing fair hearings (*id.* at 285), and stated that the Department's "regulations do not require individual notice of adverse action when mass changes in program benefits are proposed" (*id.* at 289). The committee accurately distinguished between mass changes and the requirement of "individual notices in non-mass change adverse action contexts" (*ibid.*). See Fed. Resp. Br. 22.[6] This demonstrates that Congress understood the

[6] Plaintiff-respondents disparage the significance of these statements of Congress's understanding on the basis that this House Report was written in 1976, before the second clause of what is now Section 2020(e)(10) was enacted (Br. 26). That, however, is of no significance: the statements were a description of the regulatory

distinction drawn by the Secretary between mass changes and adverse actions and incorporated that distinction by its use of the terms "individual notice" and "notice of adverse action" in Section 2020(e)(10).[7]

Plaintiff-respondents' contrary argument relies heavily (Br. 27) on the House and Senate conference reports on the Food Stamp Act of 1977. H.R. Rep. 95-599, 95th Cong., 1st Sess. 197 (1977); S. Rep. 95-418, 95th Cong., 1st Sess. 197 (1977). However, those reports do no more than summarize the effect of the second clause of Section 2020(e)(10). Indeed, the reports use the term "adverse action" in precisely the same sense in which it is used in the statute, the regulations, and the earlier House Report. Plaintiff-respondents' convoluted attempt to show that Congress did not understand the meaning of the terms it was using simply ignores the linguistic and regulatory context of the statute and the conference reports.[8]

Developments subsequent to the Food Stamp Act of 1977 cast further light on the mass change notice requirements. At the time of the 1977 Act, Congress ex-

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notice requirements as they existed at that time, not a description of the legislation. In any event, the 1977 Act did not alter the scope of the prior regulatory notice requirements.

[7] As plaintiff-respondents point out (Br. 26) the second clause of Section 2020(e)(10), which employs the "individual notice" and "adverse action" terminology, was added to the legislation during committee mark-up, without any suggestion that a different meaning was intended. Had Congress intended to invalidate the Department's regulations and to renounce the well-recognized distinction between mass changes and adverse actions, it surely would have included some explanation to that effect in the legislative history.

[8] Plaintiff-respondents attempt to draw a distinction (Br. 27) between "notice of adverse action"—the term used in the regulations and the statute—and "notice of *the* adverse action," which is used in the conference reports. The context convincingly demonstrates, however, that Congress did not intend these formulations to convey a substantive difference in meaning.

pressed its desire through a legislative report that the Department provide individual notice—not just announcements in news media and food stamp offices—to food stamp recipients, to inform them of the mass changes enacted by the 1977 Act. See H.R. Rep. 95-464, *supra*, at 289. Accordingly, by regulation, the Secretary required that the states provide individual notice of these changes, either by sending an "individual notice of adverse action" to each affected household or by sending a "general notice" to all or part of the recipient population stating the reasons for the change. See 7 C.F.R. 273.12(e)(4). The following year, the Secretary established a new policy requiring general notices to be sent directly to affected households in the event of any mass change. See 43 Fed. Reg. 18896 (May 2, 1978) (proposed rule); 7 C.F.R. 273.12(e). The content requirements for these "individual" mass change notices were not expanded; the states were required to inform affected households of the nature of the mass change, but were not required to provide recipient-specific information. With minor modification in 1981, these regulations remain in place today.[9]

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[9] Plaintiff-respondents argue (Br. 29-30) that the final clause of Section 2020(e)(10), which was added in 1982 (Pub. L. No. 97-253, § 171, 96 Stat. 780), indicates that mass changes must be treated in the same way as adverse actions under Section 2020(e)(10). This does not follow. This final clause permits states to effectuate changes in food stamp benefits without notice or hearing where the information on which the change is made is provided by the recipient household. Such reductions are, by definition, household-specific. But for the 1982 amendment, they would be subject to the adverse action notice and hearing requirements. That Congress exempted such changes from the adverse action requirements carries no implication that mass changes—which were not subject to such requirements—are encompassed by Section 2020(e)(10).

Indeed, as pointed out in our opening brief (at 33-34), the same principle reflected in the final clause of Section 2020(e)(10) would suggest that no notice or hearing is required for mass changes. The two situations are similar in that they entail no factual disputes and the only risk of error is computational. The govern-

Plaintiff-respondents' principal response to our construction of the statutory and regulatory notice requirements (Br. 28-30)[10] is to argue that "the very purpose and structure of § 2020(e)(10) within the Food Stamp Act" (Br. 28) prove that notices must be "sufficiently informative to allow participants to make a rational decision regarding whether or not to appeal" (Br. 29). However, this notion—which they dub a "matter of common sense" (Br. 30)—is of their own invention. It has not been the understanding of Congress or the Department that the notice—even a notice of adverse action—will necessarily be sufficient in itself to enable a recipient to decide whether to appeal his level of benefits. Rather, the notice is merely one element in an informative process.

Departmental regulations mandate that, upon request, the state agency must provide a recipient, without charge, with "the specific materials necessary • • • to determine whether a hearing should be requested or to prepare for a hearing." 7 C.F.R. 273.15(i)(1). And when a recipient requests a fair hearing, regulations require that he be provided with all the documents and records pertinent to his case before the hearing takes place. 7 C.F.R. 273.15(p)(1). These procedures provide ample means for recipients to make an informed judgment on whether to file an appeal, without requiring the states to provide extensive recipient-specific information in all notices.

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mental interest in prompt effectuation of such factually-uncontested changes (in both situations) outweighs the very slight risk that, without notice and a hearing, computational errors would occur. And, of course, should a household discover that its allotment was incorrectly computed in either situation, it would be protected by its right to a fair hearing.

[10] Plaintiff-respondents' linguistic arguments, based on the supposed ordinary definition of the terms "adverse action" (Br. 24-25) and "individual" (Br. 28-29) have already been dealt with. Plaintiff-respondents' proffered definitions are at odds with the meaning of the terms as revealed by their regulatory context and by the legislative history.

Congress has indicated that it shares this approach. In the House Report on the Food Stamp Act of 1977, the committee stated that "[u]pon request, the state agency makes available without charge the specific materials necessary for a household or its representative to determine whether a hearing should be requested * * *." H.R. Rep. 95-464, *supra*, at 286. Thus, there is no requirement that a notice, even an adverse action notice, must provide sufficient information in itself "to allow participants to make a rational decision regarding whether or not to appeal" (Pl-resp. Br. 29). Rather, the notice is intended to inform the recipient that a change is being made, and to provide information on where to obtain further information and how to take an appeal.

The function of a mass change notice is even more modest. As pointed out in our opening brief (at 22), mass change notices serve the regulatory policies of enabling households to adjust their budgets to the changes and of reducing the need for client calls and visits to caseworkers with questions. It is not expected that routine computerized calculations, based on existing file data, will ordinarily generate errors, confusion, or even controversy (except of a legislative sort). It does not follow from the purpose of these notices that they must contain the elements of information that plaintiff-respondents demand.

Section 2020(e)(10) cannot, therefore, be read to require advance notice of mass changes in the Food Stamp program. The notice requirements to which the statute refers apply solely to household-specific "adverse actions." The mass change notice regulation, 7 C.F.R. 273.12(e)(2)(ii), is not susceptible to a construction that would require recipient-specific information (prior benefit amount, new benefit amount, amount of earned income). As discussed above, the regulation simply requires that notice be sent to affected households informing them of the mass change. The Massachusetts notice plainly satisfied this requirement.

Even if the Department's regulations do not reflect the best, or the only, interpretation of the notice requirements of the Food Stamp Act, that interpretation should be upheld so long as it is "based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5.[11] The regulations in question were promulgated pursuant to a broad, explicit delegation of legislative rulemaking authority to the Secretary. 7 U.S.C. 2013(c); see *Knebel* v. *Hein*, 429 U.S. 288 (1977). Where, as here, Congress has not expressly set the contours of a notice requirement, but "explicitly left a gap for the agency to fill" (*Chevron*, slip op. 5), the agency interpretation is entitled to particular weight.

Policies for administration of the Food Stamp program have been developed largely by means of regulation rather than statutory prescription. The original Food Stamp Act of 1964 established only the general outlines of the program, leaving broad discretion in the Secretary to decide how to set up and administer it. See Pub. L. No. 88-525, 78 Stat. 703 *et seq.* As has been discussed, the notice requirements applicable to the program originated in the Secretary's regulations; even now, Congress has not attempted to restate the large part of those requirements, but has presupposed those requirements in amending the Act. It is difficult to imagine a stronger case for deference to the administrative interpretation.

C. The Massachusetts Notice Satisfied Or Exceeded Constitutional Requirements

1. In our opening brief (at 18-34), we explained that no individual notice whatsoever was required of the

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[11] See also, inter alia, *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility District*, No. 82-1071 (June 5, 1984), slip op. 8; *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 19-20; *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

statutory change in food stamp benefits, because Congress is free to modify noncontractual welfare benefit levels without individual notice to affected individuals, and to implement changes immediately. Plaintiff-respondents have no response other than to assert (Br. 47) that "[t]his is not a case in which the plaintiffs have challenged the authority of Congress to decrease the amount of the earned income disregard that they had been receiving." They say that they seek only the ability to chalienge "the amount or fact of the specific proposed reduction in [their] individual case" (Br. 47-48). Apparently, plaintiff-respondents do not challenge Congress's authority to *amend* the law, but only its ability to *implement* it.

Let us take a simple example. Congress votes to reduce [12] food stamp benefit levels by half, effective upon enactment. According to plaintiff-respondents' theory, Congress could not do so. The states would first have to provide notice to every food stamp recipient, informing them of the change, their former benefit level, their new benefit level, and the method of computation. Each recipient would then have the opportunity to obtain a hearing in advance of the change, to ensure that the change is computed accurately. The result of such a procedure, of course, would be to guarantee recipients continued enjoyment of benefits at a level twice that established by law.

This scenario is in direct conflict with this Court's established principles that food stamp benefits, like other noncontractual public benefits, "may be altered or even eliminated [by Congress] *at any time*" (*United States*

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[12] The example is equally apt if Congress votes to *increase* benefits in other entitlements programs, such as Aid to Families with Dependent Children, Social Security, or Supplemental Security Income. Such increases (because they would affect a household's unearned income) would entail reductions in food stamp benefits. Indeed, this is the more common type of "mass change." See 7 C.F.R. 273.12(e)(2)(i) and (3)(i).

Railroad Retirement Board v. *Fritz*, 449 U.S. 166, 174 (1980) (emphasis added)), and that due process hearing rights "cannot be stretched to impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits" (*Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971) (citation omitted)). Nor can it be justified on the basis of *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (see Pl-resp. Br. 48-49). *Goldberg* involved the procedures necessary to protect an individual's right to statutory benefits *in accordance with* the levels and standards established by Congress. If John Kelly's factual contentions in *Goldberg* were correct, then he was entitled under law to retain his prior benefits. By contrast, in the instant case, members of the plaintiff class are not entitled to continuation of their prior benefits, no matter what their individual factual claims may be.[13] They have no "property interest" in continuation of their prior benefit level; their benefits have been reduced by law. See *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 798 (1980) (Blackmun, J., concurring); *Kizas* v. *Webster*, 707 F.2d 524, 537 n.64 (D.C. Cir. 1983), cert. denied, No. 83-731 (Jan. 9, 1984).[14]

Plaintiff-respondents contend (Br. 50) that this conclusion would mean that a household with no earned in-

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[13] As noted in our opening brief (at 19-20 n.20), there is no need in this case to consider the different questions that would arise if a congressional change in benefits required new factual determinations.

[14] Plaintiff-respondents argue (Br. 43) that this position was rejected in *Yee-Litt* v. *Richardson*, 353 F. Supp. 996 (N.D. Cal.), aff'd summarily, 412 U.S. 924 (1973). However, *Yee-Litt* affirmed the distinction between factual determinations and legal changes, requiring due process procedures where the distinction, as drawn by the state, was so unclear and unmanageable that it resulted in the denial of "pre-termination hearings to welfare recipients who have raised *factual* issues on appeal." 353 F. Supp. at 999 (emphasis added).

come that was terminated from the program would have no right to a hearing. This is simply false. Such a household would have a right to a hearing to challenge the termination, just as a household would have a right to a hearing if it simply ceased to receive benefits due to an unknown and undetected error. Merely because no notice need be supplied when Congress changes benefit levels does not mean that errors, when brought to the attention of the authorities, need not be corrected.

2. Our opening brief (at 35-43) also demonstrated that, assuming some notice of the change in the earned income disregard was required, the Commonwealth's notice was sufficient.[18] One of the reasons for this is that the risk of erroneous deprivation from implementation of the change was minimal. Plaintiff-respondents challenge this conclusion (Br. 52-56).

Plaintiff-respondents first challenge (Br. 53-54) our observation that any errors caused by a backlog in the entry of monthly income data have no bearing on this

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[18] The court of appeals, relying on First Circuit precedent antedating *Bose Corp.* v. *Consumers Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984) (see, *e.g.*, *Lynch* v. *Dukakis*, 719 F.2d 504, 513 (1st Cir. 1983)), reviewed the district court's findings on this and other aspects of the due process analysis under the "clear error" standard of Fed. R. Civ. P. 52(a), even though it recognized those findings as ones of mixed law and fact (Pet. App. A19). The court of appeals concluded that, since the district court had "applied the appropriate legal standard, the *Mathews* balancing test," its task was "limited" to reversing only for clear error (Pet. App. A20). As we pointed out in our opening brief (at 32 n.30), the application of the "clear error" standard to mixed questions of law and fact was rejected by this Court in *Bose Corp.*, slip op. 15. Plaintiff-respondents' treatment of this issue (Br. 64-68) is totally unresponsive. Our point is not that "Rule 52(a) is inappropriately applied in cases involving constitutional adjudication" (Pl-resp. Br. 66), but that it is inappropriately applied to mixed questions of law and fact. The holding in *Bose Corp.* on which we rely was not, as plaintiff-respondents contend (Br. 65) "expressly limited" to determinations of actual malice in libel suits. See *Bose Corp.*, slip op. 15.

case. They profess to find it "strange" and the "height of audacity" to suggest that errors stemming from pre-existing deficiencies in the file data should not affect the procedures for implementing unrelated statutory changes in benefit levels. However, the plain fact of the matter is that any errors resulting from a data entry backlog would have occurred whether or not the earned income disregard was changed. The backlog admittedly increased the risk of errors, but not the risk of errors *resulting from the statutory change*. And as a matter of law, the risk of unrelated errors does not support a requirement of notice.

Second, plaintiff-respondents attempt (Br. 54-55) to rehabilitate the credibility of the flawed "random sample" they introduced in district court. While acknowledging that they included 17 pages from a different data series in their study, they contend that this error "merely enhances the lower courts' conclusions" (Br. 54). The basis for this startling contention is their unsupported assertion that none of the cases included in the 17 erroneously considered pages contained an erroneous reduction or termination of benefits. The record provides no support for this assertion.[18] Although logically there should be no errors stemming from a change in the earned income disregard in those 17 pages (since none of those households had earned income), the same is true of the households with no earned income properly included in the study. Just as extraneous errors from other causes were reflected in the households properly in the study, we would expect that extraneous errors would be reflected in the 17 pages improperly included. Since we do not know how many such errors there were, or what might be their source, we cannot rely on the study as a whole.

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[18] The full "random sample" is not in the record; only two representative pages were introduced.

More to the point, we showed in our opening brief (at 30-31 & n.27) that the errors actually identified in the study were attributable to an unrelated (and promptly corrected) error in the treatment of the $10 minimum benefit. Plaintiff-respondents concede that this was an "additional programming flaw" (Br. 55)—not an error in the calculation of the earned income disregard. They also concede (Br. 55) that one of the two identified errors in the sample page from the study "might have been affected by the minimum benefit error."[17] This directly contradicts their statement that "the random sample identified only those programming errors which logically flowed from the nature of the change [in the earned income disregard]" (Br. 55). The presence of unrelated errors in the study makes it useless for purposes of this case.

In any event, the significance of this flawed study should not be overstated. The principle of law at issue transcends any dispute over the accuracy of this computer program, and the holding of this Court will affect the administration of welfare programs across the nation. The requirements of due process must, of necessity, be evaluated according to a general assessment of probabilities, not according to a post hoc view of the results in the particular instance. The position of the federal respondent is that mere arithmetic calculations of revised benefit levels, based on existing data, do not give

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[17] We do not understand why plaintiff-respondents assert (Br. 55) that the other erroneously-treated household on the sample page from the study was unaffected by the minimum benefit error. The household had been receiving the minimum benefit, and then was erroneously terminated. Although it cannot be known with certainty, the most logical deduction is that this error stemmed from the same source. (It seems more than a coincidence that every household in the study identified as suffering an error had previously been receiving the $10 minimum benefit.) In any event, since the household had no earned income, it is clear that the error did *not* result from the change in the earned income disregard. That is the only fact of significance to this litigation.

rise to sufficient risk of error to justify requiring individualized notices and hearings. Moreover, we contend that the system of individual notices and hearings is not needed or well-suited to mass changes, since any programming error would affect thousands of recipients in an identical fashion, and thus would be rapidly discovered and corrected. See *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. at 799-801 (Blackmun, J., concurring).[18] In addition, the procedures for reducing error built into the system (described in our opening brief at 5-7) are constitutionally sufficient.

Plaintiff-respondents' "random sample" does not affect the validity of these conclusions. The sole relevance of the "random sample," according to the court of appeals (Pet. App. A25), is that it purported to show that "a number of errors did occur, the simple ministerial nature of the change notwithstanding." Given the flaws in the study, we believe that it has not been shown that *any* errors resulted from implementation of the statutory change. But even if there were such errors, neither the courts below nor plaintiff-respondents have shown any justification for a general constitutional rule that all statutory changes in benefit levels, even those that are accomplished by means of arithmetic calculations based on preexisting data, must be preceded by recipient-specific notices.

Such a constitutional rule would seriously disrupt the uniform administration of federal benefit programs.

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[18] As Justice Blackmun stated, "When governmental action affects more than a few individuals, concerns beyond economy, efficiency, and expedition tip the balance against finding that due process attaches." *O'Bannon*, 447 U.S. at 800. Here, the change in the earned income disregard affected some 16,000 residents of Massachusetts. It is foolish to suppose that a computer error affecting all or large classes of these individuals would be corrected through the process of individual hearings. Rather, the error (if any) would be promptly identified and corrected for the entire class, as was the case with the Commonwealth's error in the calculation of the $10 minimum benefit (J.A. 49, 250).

Program requirements for state-administered programs are necessarily set in accordance with the capabilities of all states, not just those that, like Massachusetts, have a highly-developed computerized administration system. Administrators of the Food Stamp program estimate that no more than a dozen states would have the computer capability to generate the sort of notice required by the courts below. And parallel problems would be created for Aid to Families with Dependent Children, which is administered on a similar basis and has similar notice requirements. See 45 C.F.R. 205.10(a)(4)(iii). Thus, even if the district court was correct that the detailed notice required below would have been administratively feasible for Massachusetts (Pet. App. A75-A76)—a question of policy better decided by those entrusted by Congress with administration of the program—that conclusion should not have served as the basis for a constitutional rule.[19]

Nor would the effect of an affirmance here be confined to statutory reductions in federal welfare programs. As pointed out in our opening brief (at 33-34) and not

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[19] In this connection, we would reiterate the concern expressed in our opening brief (at 36 n.31) that the test announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), may not be appropriate for evaluating the sufficiency of notice. Plaintiff-respondents (Br. 51 n.33) call this problem a "red herring," claiming that the *Eldridge* analysis is simply a "further refinement" of the notice standards of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). However, the *Mullane-Memphis Light* standard for sufficiency of notice is set in terms of objective reasonableness, which will not change from case to case or state to state. The *Eldridge* factors, by contrast, are essentially a cost-benefit standard. As applied by the courts below, notice requirements under the *Eldridge* standard will vary according to the capabilities of various states under various contingencies. As we pointed out (Br. 36 n.31), and plaintiff-respondents have not answered, the government's inability to anticipate what standards might be imposed by the courts under *Eldridge* creates serious risks of disruption of the program.

answered by plaintiff-respondents, it is difficult to find a limiting principle in the holding below. The risk of inadvertent computational error exists whenever the government sends out a check, makes a deduction, or provides a benefit. It exists whether the benefits are reduced, increased, or kept the same. It simply cannot be the case that whenever the government performs a computation, it must provide advance notice with sufficient information to enable affected individuals to check the arithmetic and request a hearing.

Plaintiff-respondents also exaggerate the value of recipient-specific notices as a means of discovering and correcting errors. They assert (Br. 56) that the "unchallenged testimony of Dr. Mark Bendick, a world-renowned expert on the administration of public assistance programs" was that "errors could have been detected and avoided in the main" through the provision of recipient-specific information (citing J.A. 95-96). The record does not support this reading. Although Dr. Bendick strongly endorsed the provision of recipient-specific information (even in mass change situations), he did so because it would reduce unnecessary appeals and inquiries to the agency (J.A. 95). Dr. Bendick expressed no opinion on whether such notices would reduce substantive errors in food stamp allotments.

On a common sense level, it is difficult to understand why plaintiff-respondents place so much emphasis on receiving the old benefit amount, the new benefit amount, and the amount of earned income. A recipient household would be aware of the old benefit amount from last month's allotment and would learn the new benefit amount from the new allotment. And the earned income figure, by itself, would generally be insufficient for the household to be able to compute the change in its benefit level resulting from the reduction in the earned income disregard, because further computations are required before actual benefit levels can be deduced. See 7 C.F.R. 273.10 (e)(2). Unless the state agency were required to sup-

ply extensive backup file data to explain the relationship of the earned income figure to the actual benefit level (a procedure that would be quite costly and probably beyond the capabilities of most states), the notice would be likely more to confuse than to inform.

This reinforces the wisdom of avoiding detailed constitutional requirements for the contents of notices. The essential ingredient, as this Court held in *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 14-15 (1978), is that the notice inform its recipient "of the availability of a procedure for protesting" the proposed action. The notices here satisfied this basic requirement.[20]

Plaintiff-respondents also state (Br. 56) that the district court found that without recipient-specific information, "recipients could not even discover any mistakes, much less attempt to have them corrected." However, as pointed out above (see pages 15-16, *supra*), neither Congress nor the Department has intended that notices be the recipients' sole source of information. Thus, while it is true that mistakes might not be detected on the basis of the notice alone, recipients would quickly become aware of their new benefit levels when their allotment card arrived about ten days later; if they had any doubts about the correctness of the allotment, they would have the right

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[20] Plaintiff-respondents misleadingly truncate a quotation from *Memphis Light* that underscores our point (Br. 62, quoting *Memphis Light*, 436 U.S. at 14-15 n.15):

> Here, however, the notice is given to thousands of customers of various levels of education, experience and resources. Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly....

Deleted from the end of this quotation was the following:

> of the availability of an opportunity to present their complaint. In essence, recipients of a cutoff notice should be told where, during which hours of the day, and before whom disputed bills may be considered.

to "the specific materials necessary * * * to determine whether a hearing should be requested" (7 C.F.R. 273.15 (i)(1)); and they were fully informed about how to obtain further information or a hearing. Indeed, plaintiff-respondents' own expert, Dr. Bendick, testified that the "tendency" of a food stamp recipient under these circumstances is "to approach the agency to seek clarification of the information" (J.A. 96). Thus, although recipient-specific notices might provide information more quickly, and with fewer unnecessary inquiries to the agency, it simply is not true that they are indispensable for recipients to discover mistakes or have them corrected.[21]

The notices actually provided by the Commonwealth contained no inaccuracies that have been identified in this litigation,[22] used terms that are "generally familiar" to food stamp recipients (Pet. App. A96), and were sufficiently informative to enable each of the named plaintiffs, whose claims are representative of the class (Fed. R. Civ. P. 23(a)), to file an appeal and obtain a fair hearing. Certainly the notices could have been clearer or contained more information, but the Constitution does not require it. The proper avenue for seeking improvements in the form and content of mass change notices in the Food Stamp program is to request changes from the states and the Department (or Congress)—not to sue in federal court.

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[21] The district court's finding on this point (Pet. App. A70-A71) was simply that recipients could not detect errors on the basis of the notice; the court did not imply that it was not possible through other readily available sources of information.

[22] Plaintiff-respondents assert, without elaboration, that the notices contained "misleading language" (Br. 61); however, they have never identified any inaccuracies or suggested any ways in which the notices might plausibly have been misinterpreted.

II. THE DISTRICT COURT'S REMEDIAL ORDER WAS BEYOND THE COURT'S STATUTORY AND EQUITABLE AUTHORITY AND IN VIOLATION OF SOVEREIGN IMMUNITY

A. Neither The Food Stamp Act Nor Principles Of Equitable Discretion Justify The District Court's Order To Provide Food Stamp Benefits In Amounts Exceeding The Level Established By Congress

The district court ordered the Commonwealth to "return" all food stamp benefits "lost" to the plaintiff class as a result of the action taken pursuant to the December notice, for the period between January 1, 1982, and the earliest of the household's recertification, the date the household was terminated or withdrew for other reasons, or the date the household was provided a legally sufficient notice (Pet. App. A101). The effect was to require the Commonwealth to pay food stamp benefits at a level higher than that set by Congress for a period of up to one year.

The court of appeals reversed this remedial order. The court pointed out that there had been no "showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated" (Pet. App. A33). The court reasoned, therefore, that "[r]estoration of benefits would constitute a windfall to recipients and would result in the continuation of benefits at a level exceeding that authorized by Congress" (*ibid.*).[23]

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[23] The court also stated that the order of retroactive benefits would not provide any incentive to the states to correct the problem—and indeed might even be seen as an "attractive possibility"—since the federal government fully finances the Food Stamp program and thus would bear the cost. While this point has considerable validity as a practical matter, it should be noted that, as a legal matter, the state might ultimately be obligated to bear the cost of such an order under some circumstances. Although the federal government would redeem the additional food stamps in the first instance (7 U.S.C. 2013(a)), the Secretary is authorized to recover from the states the cost of certain overissuances. 7 U.S.C. 2020(g); see also 7 U.S.C. 2016(f), 2025(d); *Woods* v. *United States*, 724 F.2d

Plaintiff-respondents challenge this holding. They contend, in the alternative, that the plaintiff class was correctly awarded the retroactive benefits as a matter of statutory entitlement under 7 U.S.C. 2023(b) and that the remedial order was within the district court's equitable discretion. Neither argument has merit.[24]

1. The statute upon which plaintiff-respondents rely, 7 U.S.C. 2023(b), provides:

> In any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action * * *.

Reasoning that "actions taken in violation of federal statutory and regulatory procedural requirements are 'wrongful'" (Br. 42), plaintiff-respondents contend that whenever a procedural error occurs in the course of effectuating a reduction in benefits, the allotment is "wrongful," whether or not the allotment is substantively correct. Thus, in the instant case, even though Congress lawfully reduced food stamp benefits for recipients with earned income, the allotments of the plaintiff class were "wrongfully withheld" because the Commonwealth's notice of the lawful reductions was inadequate.

This position is absurd on its face and would, as the court of appeals stated, result in a "windfall" to plaintiff-respondents. Plaintiff-respondents themselves acknowledge that their right at stake in this litigation is "not * * * the right to the continued receipt of any given

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1444 (9th Cir. 1984). If a state's failure to comply with statutory or constitutional standards in providing notice is the cause of payments in excess of the statutory level, the Secretary might be justified in recovering the excess amount from the state.

[24] If this Court agrees with our submission that the Massachusetts notices did not violate the Constitution, the Food Stamp Act, or the Department's regulations, there is no need for the Court to address the remedial issues discussed in this portion of our brief.

amount of benefits, but rather the right to the receipt of the correct amount of benefits" (Br. 49). The "correct" amount of benefits is the amount voted by Congress, no more and no less. We simply fail to see how the plaintiff class could be entitled to "benefits at a level exceeding that authorized by Congress" (Pet. App. A33), or could contend that the Commonwealth's failure to pay them benefits exceeding the statutory level constituted a wrongful withholding of benefits. While the court of appeals concluded (incorrectly, in our view) that proper *notice* was wrongfully withheld, it does not follow that any food stamp *allotments* were wrongfully withheld.

In any event, the legislative history of Section 2023(b) shows that the restoration remedy was intended for substantive errors in food stamp allotments, not procedural errors that did not affect the outcome. Section 2023(b) is a limit on the period of time for which courts in judicial review proceedings may restore benefits to states, retail establishments, or households. It is parallel to Section 2020(e)(11), which requires the states to provide for "the prompt restoration in the form of coupons to a household of any allotment or portion thereof which has been wrongfully denied or terminated" for a period of up to a year from the discovery or notification of the error. Both sections find their origin in prior regulatory provisions.

Prior to the Food Stamp Act of 1977, the Food Stamp program required participants to purchase their food stamp coupons with cash. 7 U.S.C. (1976 ed.) 2016(b). The coupons were sold at a discount. The difference between the value and the cost of the coupons was known as the "bonus." Initially, the Department required the states to recompense participants, by means of cash refunds, only when the household had "been *overcharged* for its coupon allotment as a result of an error by the State Agency" (37 Fed. Reg. 25322 (Nov. 30, 1972) (emphasis added)). The cost of such refunds was borne by the federal government. No retroactive adjustments

were required for wrongful terminations or determinations of ineligibility, or for errors that resulted in the receipt of fewer food stamps than the household was entitled to. This was on the theory that injuries to past food consumption could not be remedied. *Bermudez* v. *Department of Agriculture*, 490 F.2d 718, 720 n.2 (D.C. Cir.), cert. denied, 414 U.S. 1104 (1973). This interpretation of the Food Stamp Act was rejected by some federal courts. *Carter* v. *Butz*, 479 F.2d 1084 (3d Cir.), cert. denied, 414 U.S. 1094 (1973); *Bermudez*, *supra*.[25]

In response to *Bermudez*, the Department adopted a new regulation that required states to provide retroactive corrections for substantive errors in benefit amounts, ineligibility determinations, or terminations (41 Fed. Reg. 11466 (Mar. 19, 1976), codified at 7 C.F.R. 271.1 (q) (1977) (emphasis added)):

> Whenever an administrative error on the part of the State agency results in a household receiving *fewer bonus stamps than it is entitled* because the total coupon allotment received (if any) was smaller than the amount for which the household was actually eligible, the household shall be entitled to restoration of lost benefits.

In the Food Stamp Act of 1977, Congress discontinued the cash purchase system for food stamps. In amending the statutory scheme, Congress codified the regulatory benefit restoration provision, using terminology more appropriate to the revised system. This is the origin of 7 U.S.C. (Supp. II 1978) 2020(e)(11):

> The State plan of operation * * * shall provide, among such other provisions as may be required by regulation—
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> * * * * *

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[25] It is significant that in *Bermudez*, every member of the plaintiff class had been deprived, through error, of food stamps to which they were entitled. None of the plaintiffs asserted a mere procedural error. 490 F.2d at 720 n.1.

> (11) for the prompt restoration in the form of coupons to households of any allotment or portion thereof which has been wrongfully denied or terminated.

See Pub. L. No. 95-113, § 1301, 91 Stat. 972. Nothing in the legislative history suggests that Congress intended to alter the scope of the restoration provision; indeed, the House Report referred explicitly to the prior regulation as explanation for the provision. H.R. Rep. 95-464, *supra*, at 283-284. The report described the effect of Section 2020(e)(11) as follows (H.R. Rep. 95-464, *supra*, at 285 (emphasis added)):

> Thus, if a household *lost benefits* because it was found to be ineligible when it was eligible or because its allotment was not as high as it should have been such benefits would be recouped in the form of allotment add-ons.

The statutory phrase "allotment * * * which has been wrongfully denied or terminated" (7 U.S.C. 2020(e)(11)) thus refers to "lost benefits," *i.e.*, substantive errors in allotment amount—not to procedural errors having no effect on the level of benefits.

Nor did the addition of 7 U.S.C. 2023(b) in 1981 create a right to retroactive readjustments for non-substantive errors. The 1981 amendments to the Food Stamp Act, in relevant part, Pub. L. No. 97-98, § 1320, 95 Stat. 1286-1287, limited the period of restoration of wrongfully withheld benefits to one year prior to discovery of the error. This was done by means of addition of a new clause to Section 2020(e)(11) and of a new Section 2023(b) to ensure that judicial remedies would be coextensive with administrative remedies. The legislative history makes clear that the sole purpose of this amendment—and thus the sole purpose of Section 2023(b)—was to *limit* the federal government's liability to restore "lost" food stamps benefits. H.R. Rep. 97-106, 97th Cong., 1st Sess. 11, 60 (1981). It would have been

entirely inconsistent with the cost-saving emphasis of the 1981 legislation (see *id.* at 55-58) to *expand* liability to include mere procedural errors that were not subject to the restoration provision under prior law. It is therefore clear that Section 2023(b), on which plaintiff-respondents rely, does not create a right to retroactive benefits for nonsubstantive errors in food stamp administration.

The conclusion that food stamp recipients are not entitled to retroactive benefit adjustments where their benefits were substantively correct is underscored by the provision for state recoupment of excess food stamp benefits from recipient households. If the household receives a continuation of benefits at the prior level during the pendency of a fair hearing (see 7 U.S.C. 2020(e)(10) (second clause); 7 C.F.R. 273.15(k)), and the state agency action is upheld, "a claim against the household shall be established for all overissuances." 7 C.F.R. 273.15(k)(1); see also 7 C.F.R. 273.18(b)(1)(iii).[26] In the absence of a substantive error in the food stamp allotment, the household is required to return all excess benefits it received during the pendency of the fair hearing. If members of the plaintiff class had received sufficient notice and had taken an appeal, they would not have been permitted to keep any benefits over the level to which they were substantively entitled; under no circumstances could they have retained a level of benefits in excess of that set by Congress. To grant members of the plaintiff class enhanced benefits to which they were not substantively entitled, therefore, does not merely "restor[e] the *status quo* existent before the Department's unlawful action," as plaintiff-respondents suggest (Br. 45); it gives them, as the court of appeals recognized, a windfall.

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[26] These regulatory provisions for the recoupment of food stamp overissuances receive statutory recognition in 7 U.S.C. 2022(b), which governs the means by which state agencies may collect claims against households.

This demonstrates the fallacy in plaintiff-respondents' argument (Br. 38) that Congress intended to create a system in which "most households would receive, for a time, benefits at a level that is substantively incorrect." The rationale for the benefits continuation provision on which plaintiff-respondents rely is that the state, rather than the recipient, can better afford to stake the disputed amount while the question is being resolved. If, after the hearing, it is determined that the state's proposed action was proper, the household is required to pay back the excess. This does not, as plaintiff-respondents contend (Br. 39), support the view that food stamp households have a permanent "substantive entitlement to receive their prior level of benefits" during the hearing process.

Plaintiff-respondents' reliance on this score on *Sampson* v. *Murray*, 415 U.S. 61 (1974), is misplaced. *Sampson* established merely that under the express terms of the Back Pay Act, a Civil Service employee who is "found by appropriate authorities under applicable law or regulation to have undergone an unjustified or unwarranted personnel action" is entitled to reinstatement with back pay. 415 U.S. at 75 & n.31 (quoting 5 U.S.C. (1970 ed.) 5596(b)). See also *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 740 (1982) (citation omitted) (Back Pay Act "expressly provide[s] money damages as a remedy against the United States in carefully limited circumstances"). Civil Service regulations, in turn, expressly permitted employees to appeal dismissals "on the ground that [their] termination was not effected in accordance with the procedural requirements of [the regulations]." *Sampson*, 415 U.S. at 66 n.7 (quoting 5 C.F.R. 315.806(c) (1973)). The Food Stamp Act contains no such feature.

In this connection, a comparison of *Sampson* to *Codd* v. *Velger*, 429 U.S. 624 (1977), is instructive. In *Codd*, the plaintiff, a probationary employee who was discharged without a hearing on the basis of derogatory information placed in his file, sought job reinstatement

and compensatory damages as a remedy for the denial of a hearing.[27] This Court held, however, that he was not entitled to these remedies, because he had not alleged that there was an actual substantive error in the decision that had been made. "[I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's [liberty interest]." *Id.* at 627.

Codd thus demonstrates that the provision of retroactive monetary relief for procedural errors under the Back Pay Act, as discussed in *Sampson*, does not extend beyond the scope of that Act—even within the field of public employment. Even more farfetched is plaintiff-respondents' attempt to stretch the analogy of the Back Pay Act to create an implied right to enhanced benefits under the Food Stamp Act.

2. It follows that the district court's order cannot be justified as an exercise of its equitable discretion.

In the exercise of its discretion, a court is not free to disregard other laws. Specifically, as this Court has stated, the courts have a "duty * * * to observe the conditions defined by Congress for charging the public treasury." *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 385 (1947). The level of food stamp benefits is established by Congress, not by the states or by the Secretary. As a general matter, a court's remedial authority is confined to the scope of discretion vested in the parties before the court; the court may not order a party to take actions outside his authority or in violation of law. In this instance, the court plainly erred in requiring the Commonwealth to pay benefits "at a level

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[27] The employee might have been entitled to a hearing even though he had no property interest in continued employment, because he had a liberty interest that was infringed by the "stigma" caused by the presence of derogatory information in his employment file.

exceeding that authorized by Congress" (Pet. App. A33). Even if Massachusetts officials committed a procedural violation, the statutory benefit levels must still be honored. Cf. *Schweiker* v. *Hansen*, *supra*.

Plaintiff-respondents' position is directly in conflict with this Court's precedents. *Codd* v. *Velger*, *supra*, already discussed, stands for the proposition that, in the absence of a statutory provision to the contrary, the denial of a procedural protection does not give rise to a right of restitution or compensatory damages unless the procedural violation resulted in a substantive deprivation.

This Court's unanimous decision in *Carey* v. *Piphus*, 435 U.S. 247 (1978), is to similar effect. In *Carey*, the plaintiffs, high school students who were suspended from school without procedural due process, sought compensatory damages for the period of their exclusion from school. This Court held that the students could not recover such damages if the school officials could show on remand that they would have been suspended even if a proper hearing had been held. 435 U.S. at 260. The Court reasoned that, if the students would have been suspended anyway, "the failure to accord procedural due process could not properly be viewed as the cause of the suspensions." *Ibid.* Indeed, the Court stated that an award of damages under such circumstances "would constitute a windfall, rather than compensation," to the students. *Ibid.*[28]

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[28] The Court also held that the students would have an action for compensatory damages if they could prove "mental and emotional distress" as a result of the due process violation (435 U.S. at 262-264), and that they would be entitled under 42 U.S.C. 1983 to "nominal damages" (435 U.S. at 266-267). In the instant case, the district court did not purport to award damages for mental or emotional distress or nominal damages; nor would such damages be authorized under law against either the Commonwealth or the federal government.

The problem here is analogous. If the food stamp benefits of the plaintiff class would have been reduced even if the Commonwealth had provided sufficient notice, then the reductions were not caused by the supposed due process violation. The only relief to which plaintiff-respondents could be entitled, as the court of appeals held, is restoration of any benefits lost as a result of substantive computational errors. To award retroactive benefits to members of the plaintiff class whose food stamp allotments were correctly computed, at a level in excess of that authorized by law, would not be "restitution," as plaintiff-respondents characterize it (Br. 44, 47). It would "constitute a windfall" (*Carey*, 435 U.S. at 260).

Contrary to plaintiff-respondents' argument (Br. 41-42, 45-46), this Court's decisions in *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), do not establish that the federal courts have general equitable authority to order retroactive relief against the federal government or the states. In both cases, the courts applied express statutory remedies. *Vitarelli* arose under the Administrative Procedure Act (see *United States* v. *Caceres*, 440 U.S. at 754 & n.18), which provides that a court may "set aside agency action" that is found to be "without observance of procedure required by law." 5 U.S.C. 706 (2)(D).[29] *Accardi* arose under habeas corpus (347 U.S. at 261), pursuant to which a court may ascertain whether the detention of an alien for purposes of de-

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[29] Significantly, under the Administrative Procedure Act monetary relief is not available. 5 U.S.C. 702. Moreover, reviewing courts are required to take "due account * * * of the rule of prejudicial error." 5 U.S.C. 706. Thus, procedural errors are disregarded that "have no substantial bearing on the ultimate rights of parties." *Market Street Ry.* v. *Railroad Commission*, 324 U.S. 548, 562 (1945). It is not certain, therefore, that agency action would necessarily be set aside under the APA where, as here, there is no colorable claim that the procedural error could have affected the outcome.

portation is, for any reason, unlawful. *Ekiu* v. *United States*, 142 U.S. 651, 662 (1892). Neither case involved the inherent powers of the court or the retroactive grant of benefits, without statutory authority, to persons who were not substantively entitled to them.

B. The District Court's Award Of Retroactive Benefits Is Precluded By The Eleventh Amendment And Principles Of Sovereign Immunity

This Court held in *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974), that a suit by private parties against a state for retroactive payments of welfare benefits found to have been wrongfully withheld is barred by the Eleventh Amendment, unless the state has consented to suit. The same principles preclude an order of retroactive benefits in the instant case.

The district court's order, while nominally running against the Commissioner of Public Welfare, will in reality be satisfied "from the general revenues of the [Commonwealth of Massachusetts]." *Edelman*, 415 U.S. at 665. See also *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 10-11; *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945). Since the Commonwealth has not consented to suit for payment of benefits in excess of those authorized by Congress, the district court's award cannot stand.

The Commonwealth cannot be said to have consented to suit merely by virtue of its participation in the Food Stamp program. *Florida Department of Health & Rehabilitative Services* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Edelman*, 415 U.S. at 673. In its plan of operation, the Commonwealth was required to agree to provide for "the prompt restoration * * * of any allotment or portion thereof which has been wrongfully denied or terminated," for a period of up to one year prior to discovery of the error. 7 U.S.C. 2020(e)(11). As explained above (at 30-32), this provision ap-

plies only to substantive errors in the amount of food stamps allotted; it does not create an obligation to pay compensation for mere procedural errors. Nowhere else in the plan of operation or the statutory scheme is there any support for the proposition that the Commonwealth has consented to be sued for retroactive benefits in excess of those authorized by Congress.

The court of appeals rejected the Commonwealth's Eleventh Amendment argument solely because "the cost of the food stamp program is borne by the federal government" (Pet. App. A36 n.6). However, the federal government ultimately only bears the cost of redeeming food stamp coupons issued in compliance with the Act. The federal government is not obligated to bear the cost of benefits in excess of those authorized by Congress, whether they were issued erroneously by the Commonwealth or required to be issued as a result of a procedural violation by the Commonwealth. Should the district court's order be reinstated, the Secretary would be authorized to attempt to recover the cost from the Commonwealth. See note 23, *supra*.

In any event, an order for retroactive payment of benefits would be equally barred by sovereign immunity if it ran against the federal government instead of the Commonwealth. The federal government, no less than the Commonwealth, is protected against retroactive monetary liability in the absence of consent, even for due process violations. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Monaco* v. *Mississippi*, 292 U.S. 313, 321 (1934). And the United States has plainly not consented to be sued for food stamp benefits in excess of those authorized by Congress, on account of procedural derelictions by a state.[30] There is no federal statute that "can fairly be interpreted as mandating

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[30] The courts below did not find that the federal respondent violated any of plaintiff-respondents' constitutional rights.

compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400 (citation omitted). Whether the district court's order would ultimately result in liability against the Commonwealth or the United States is, therefore, immaterial; under either contingency the suit would be barred.

C. The District Court Was Not Justified In Requiring the Commonwealth To Undertake Rulemaking Under Court Supervision

Congress has entrusted responsibility for administering the Food Stamp program to the Secretary and the states. The district court's order usurped the Commonwealth's authority to determine whether regulations are needed, and assumed an unwarranted degree of judicial control over the rulemaking result.[31] Such a remedy is extreme, to be imposed only where there is clear evidence that the state involved will not comply with the law. See *Allen* v. *Wright*, No. 81-757 (July 3, 1984) slip op. 21 ("suits challenging * * * the particular programs agencies establish to carry out their legal obligations * * * are rarely if ever appropriate for federal-court adjudication"); *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli* v. *Minard*, 342 U.S. 117, 120 (1951) ("[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law' "); *Laird* v. *Tatum*, 408 U.S.

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[31] Any rulemaking would be subject to judicial review under appropriate provisions of Massachusetts law. However, the district court order would apparently entail a standard of review of the Commonwealth's regulations far more stringent than the traditional "arbitrary and capricious" standard appropriate to rulemaking proceedings of this type (see, *e.g.*, *American Family Life Assurance Co.* v. *Commissioner of Insurance*, 388 Mass. 468, 478, 446 N.E.2d 1061, 1066-1067 (1983)), and would transfer review of this state rulemaking from the state to the federal courts.

1, 15 (1972) (federal courts should not act "as virtually continuing monitors of the wisdom and soundness of Executive action").

The district court's requirement that the Commonwealth's regulations be submitted to the court for advance approval is particularly inappropriate in light of the congressional determination to preclude federal advance approval of state agency methods of administration. See Pub. L. 97-253, § 166, 96 Stat. 779, codified at 7 U.S.C. 2020(d). It would require quite unusual circumstances—wholly absent here—to justify a federal court in assuming administrative supervision authority that Congress has explicitly denied to the Secretary.

In this case, the district court made no findings, and supplied no rationale, that would support the remedial order. One can only guess whether the district court issued the order with due regard for the adequacy of alternative, less-intrusive remedies or with due respect for the sovereignty of the Commonwealth of Massachusetts. Contrary to plaintiff-respondents' assertion (Br. 31), the district court manifestly did not indicate that it was "cognizant" of the factors it should consider in deciding whether to impose injunctive relief on a state. Thus, the normally deferential scope of appellate review of routine district court decisions whether to issue injunctions, where the court's articulation of the basis for its decision indicates that it has exercised its discretion within appropriate bounds (see *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)), would have been out of place in reviewing this unusual and unexplained order.

In any event, the court of appeals correctly observed that there is nothing in the record to indicate that the Commonwealth has acted in bad faith, and no reason to doubt that it will comply with legal requirements in the future (Pet. App. A37-A38). See *W.T. Grant Co.*,

345 U.S. at 633 ("[t]he necessary determination [for the granting of injunctive relief] is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive"). The court of appeals' conclusion is well supported by the record. The Commonwealth was in facial compliance with federal regulations governing the question of notice. Therefore, even if the Commonwealth and the federal respondent are incorrect in the submission that those regulations are consistent with statutory and constitutional standards, the Commonwealth had every reason to believe that its action was lawful.[32] Especially in the absence of any findings or explanation by the district court, the court of appeals was fully justified in concluding that no injunction was necessary to ensure future compliance, and that continuing judicial surveillance of the Commonwealth's administrative decisions would be inappropriate.

Plaintiff-respondents rely principally (Br. 31, 35-36) on *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), and *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). In *Hecht Co.*, however, this Court affirmed the district court's refusal to grant an injunction, rejecting the government's argument that, in the circumstances of that case, an injunction was mandatory. 321 U.S. at 330-331. The Court's statement that "[t]he historic injunctive process was designed to deter, not to punish" (*id.* at 329) was not, as plaintiff-respondents suggest (Br. 35), an instruction to the lower courts to disregard the good faith of the parties; on the contrary, to the extent that *Hecht Co.* has any bearing on this case, it supports the court of ap-

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[32] Of course, that the Commonwealth was "on notice of exactly what information *plaintiffs* considered essential" (Pl-resp. Br. 34 (emphasis added)) has no bearing on the Commonwealth's good faith compliance with the operative regulations as they stood at that time.

peals' position that an injunction is not appropriate unless it is likely to be necessary to deter unlawful conduct in the future.

Plaintiff-respondents' reliance on *Yamasaki* is similarly unavailing. There, the Court simply affirmed (442 U.S. at 705-706) that injunctive relief is *available* under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g); the Court did not address whether an injunction was "appropriate" under the circumstances of the case, as plaintiff-respondents state (Br. 34-36).

Nothing in these or any other decisions of this Court suggests that the good faith of the defendant and the likelihood of voluntary compliance in the future are improper factors for an appellate court to consider when reviewing the grant of injunctive relief.[33]

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[33] *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 18 n.17, does not suggest that the absence of bad faith should not be considered (see Pl-resp. Br. 34). The Court held only that the absence of bad faith "does not affect whether an injunction *might* be issued * * * by a court possessed of jurisdiction" (emphasis added).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals on the issue of the validity of the Commonwealth's notice should be reversed; but if it is affirmed, the judgment of the court of appeals on the issue of remedy should also be affirmed.

Respectfully submitted.

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